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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte KEIH A. LOWERY, DAVID K. DAVIDSON,
and AVINASH C. SAXENA

Appeal 2007-2574
Application 09/592,486
Technology Center 2100

Decided: March 18, 2008

Before JAMES D. THOMAS, HOWARD B. BLANKENSHIP
and ST. JOHN COURTENAY III, *Administrative Patent Judges*.

THOMAS, *Administrative Patent Judge*.

DECISION ON APPEAL

This appeal involves claims 1 through 4 and 6 through 44. We have jurisdiction under 35 U.S.C. §§ 6(b) and 134(a).

As best representative of the disclosed and claimed invention, independent claim 1 is reproduced below:

1. A method for data processing comprising:

receiving a data request at a data center, the request received from a client computer requesting data;

determining a state associated with the request to send data to the client computer;

assigning a priority to the request according to the state associated with the request and according to priority criteria associated with the state;

automatically adjusting the priority criteria;

dynamically updating the priority of the request to send data to the client computer in response to the adjusted priority criteria;

queuing the request as a function of the priority associated with the request; and

retrieving the requested data from an origin server.

The following references are relied on by the Examiner:

Reeder	US 5,852,812	Dec. 22, 1998
Colyer	US 6,023,722	Feb. 8, 2000
		(Filing date Jul. 23, 1997)
Rune	US 6,304,913 B1	Oct. 16, 2001
		(Filing date Nov. 9, 1998)
Moyal	US 6,445,680 B1	Sep. 3, 2002
		(Filing date May 27, 1998)
Starnes	US 6,578,073 B1	Jun. 10, 2003
		(Filing date Aug. 12, 1998)

Claims 1 through 4 and 6 through 44 stand rejected under 35 U.S.C. § 103. In a first stated rejection of claims 1, 6 through 8, 11 through 13, 15 through 23, 30 through 33, 35, and 37 through 44, the Examiner relies upon Colyer in view of Moyal. In the second through fourth stated

rejections the Examiner relies upon these two references respectively adding Starnes as to claims 2 through 4, 9, 10, 25 through 28, 34, and 36; respectively adding Reeder as to claims 14 and 29; and respectively adding Rune as to claim 24.

Rather than repeat the positions of the Appellants and the Examiner, reference is made to the Brief and Reply Brief for the Appellants' positions, and to the Answer for the Examiner's positions.

OPINION

For the reasons set forth by the Examiner in the Answer, as expanded upon here, we sustain the four separately stated rejections of the claims on appeal under 35 U.S.C. § 103.

For their part, Appellants present arguments only as to the first stated rejection and do not identify any particular claim therein. As to the arguments actually made, corresponding features are present in independent claims 1 and 30 within this rejection in both the Brief and Reply Brief. We will treat these arguments momentarily. The claims within the second stated rejection, which includes independent claim 25, have correspondingly argued features as independent claims 1 and 30, and are not separately argued. In fact, none of the additional references relied upon by the Examiner in the second through fourth stated rejections are argued per se and no arguments against their combinability within 35 U.S.C. § 103 are presented to us in the Brief and Reply Brief. Respectively urging at pages 11 through 13 of the principal Brief that the additionally relied upon prior art does not include any additional disclosure combinable with the primary references that would be material to patentability of the claims is misplaced.

Appellants have not questioned the Examiner's separate, respective reliance upon Starnes, Reeder and Rune and Appellants' identical position at best may be characterized as a general argument of patentability. Moreover, the arguments in the Brief as to all stated rejections are improperly presented again in the Reply Brief in addition to an attempt to respond to the Examiner's responsive arguments beginning at page 18 of the Answer.

Appellants have the burden on appeal to the Board to demonstrate error in the Examiner's position. *See In re Kahn*, 441 F.3d 977, 985-86 (Fed. Cir. 2006) ("On appeal to the Board, an applicant can overcome a rejection [under § 103] by showing insufficient evidence of *prima facie* obviousness or by rebutting the *prima facie* case with evidence of secondary indicia of nonobviousness.") (quoting *In re Rouffet*, 149 F.3d 1350, 1355 (Fed. Cir. 1998)).

"Section 103 forbids issuance of a patent when 'the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.'" *KSR Int'l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 1734 (2007).

The Supreme Court reaffirmed principles based on its precedent that "[t]he combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results." *KSR*, 127 S. Ct. at 1739. The operative question in this "functional approach" is thus "whether the improvement is more than the predictable use of prior art elements according to their established functions." *Id.* at 1740.

The Court noted that “[c]ommon sense teaches . . . that familiar items may have obvious uses beyond their primary purposes, and in many cases a person of ordinary skill will be able to fit the teachings of multiple patents together like pieces of a puzzle.” *Id.* at 1742.

The Federal Circuit recently concluded that it would have been obvious to combine (1) a device for actuating a phonograph to play back sounds associated with a letter in a word on a puzzle piece with (2) a processor-driven device capable of playing the sound associated with a first letter of a word in a book. *Leapfrog Enters., Inc. v. Fisher-Price, Inc.*, 485 F.3d 1157, 1161 (Fed. Cir. 2007). In reaching that conclusion, the Federal Circuit recognized that “[a]n obviousness determination is not the result of a rigid formula disassociated from the consideration of the facts of a case. Indeed, the common sense of those skilled in the art demonstrates why some combinations would have been obvious where others would not.” *Id.* at 1161 (citing *KSR*, 127 S. Ct. 1727, 1739 (2007)). The Federal Circuit relied in part on the fact that Leapfrog had presented no evidence that the inclusion of a reader in the combined device was “uniquely challenging or difficult for one of ordinary skill in the art” or “represented an unobvious step over the prior art.” *Id.* (citing *KSR*, 127 S. Ct. at 1740-41).

In the absence of separate arguments with respect to claims subject to the same rejection, those claims stand or fall with the claim for which an argument was made. *See In re Young*, 927 F.2d 588, 590 (Fed. Cir. 1991). *See also* 37 C.F.R. § 41.37(c)(1)(vii)(2006).

Dovetailing with this precedent, we note further that the test for obviousness has been further characterized as not whether the features of a secondary reference may be bodily incorporated into the structure of a primary reference. It is also not that the claimed invention must be expressly suggested in any one or all of the references. Rather, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art. *In re Keller*, 642 F.2d 414, 425 (CCPA 1981); *In re Young*, 927 F.2d 588, 591 (Fed. Cir. 1991).

Although we would tend to agree with Appellants' observations in the Brief and Reply Brief that the Examiner's positions in the Statement of the Rejection and the Responsive Arguments portions of the Answer can be better stated, to the extent the Examiner has explained his position and considering the applied prior art to Colyer and Moyal from an artisan's perspective, particularly in view of the just-noted legal precedent, we agree with the Examiner's view that the claims on appeal would have been unpatentable within 35 U.S.C. § 103. As will be subsequently more apparent to the reader from our observations to follow, we agree with the Examiner's conclusion that the artisan would have been motivated based upon Moyal's teachings to dynamically update a priority queue as in Colyer in response to a change of state in order to process the queue with the highest priority quickly in an effort to maximize the data processing efficiency of the overall system. Although Appellants appear to argue at

pages 9 and 10 of the principal Brief on appeal that Moyal does not teach dynamically updating the priority of a request, Appellants do recognize at page 12 of the Reply Brief that that reference does disclose that index queues are dynamically updated.

Additionally, to the extent pages 9 and 10 of the principal Brief takes the position that Colyer also fails to teach the argued feature of automatically adjusting the priority criteria, the Examiner addresses this position squarely in the paragraph bridging pages 18 and 19 of the Answer. At issue is the artisan's interpretation of the paragraph bridging columns 6 and 7 of Colyer as relied upon by the Examiner. As further explained by the Examiner at this portion of the Answer, the Examiner has compellingly indicated that the artisan would have interpreted that the priority based upon criteria such as textual information or graphical data are presented as mere examples such that the priority may be given to which ever takes less time to process, thus indicating that the criteria are automatically adjustable based on the nature of the request. This is not contested in the Reply Brief where, contrary to the Examiner's basic position as to the combination of the teachings of Colyer and Moyal, appellants wrongly assert that Moyal does not teach the adjustability of the priority criteria at all. Again, as emphasized, the Examiner's position does not indicate this reference is relied upon for teaching this claimed feature and Appellants have not contested the Examiner's observation just noted in the Responsive Arguments portion of the Answer at pages 18 and 19.

This noted portion bridging columns 6 and 7 of Colyer may be interpreted as impliedly adjusting the priority criteria as well as dynamically updating or otherwise changing it in a dynamic manner based upon the given point in time of the priority level of the request. Correspondingly, it appears to us that the artisan may well consider both features to have been otherwise indicated in Moyal as well. The discussion beginning at the top portion of column 2 relating to the arbiter in our view would have been considered by an artisan to be another way of stating a priority assigning unit such as the arbiter illustrated in figure 2 of Colyer. The stated decision of such arbitration or priority determinations was based upon the numbers of sources and the data rate of the traffic in question. When the additional teachings at that column and those of column 3 as relied upon by the Examiner, particularly the discussion related to figure 2B in the middle of that column are considered, they clearly indicate that priorities of requests in effect are dynamically updatable or changeable in response to input and output data flows. The discussion of the arbiter according to Moyal's contribution in the art in the Summary of the Invention at the bottom of column 4 is more particularly discussed beginning with the general description discussion at column 6 through column 7 and the corresponding discussion and showings in figures 3 and 4 which illustrate a dynamic and automatic adjustability of priorities by adding and removing source input queues conditionally. Contrary to Appellants' positions in the Brief and Reply Brief as to this reference, there appears to be no rigidly fixed priority criteria.

The bulk of Appellants' remaining arguments in the Brief and Reply Brief appear to look at the applied prior art from a structural combinability position which is not required by 35 U.S.C. § 103 as indicated in the legal precedent set forth earlier in the opinion. The proper approach is to look upon the teachings and suggestions of the applied prior art from an artisan's perspective which appears to us what the Examiner has done.

In view of the foregoing, we find no error presented to us by Appellants in the Brief and Reply Brief as to the Examiner's determination of unpatentability within 35 U.S.C. § 103 of claims 1 through 4 and 6 through 44. Therefore, the decision of the Examiner is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. §1.136(a). See 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

pgc

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